

Exhibit 5

Gehman, Lisa Bollinger

From: Rhett O. Millsaps II <rhett@lex-lumina.com>
Sent: Friday, October 21, 2022 1:16 PM
To: Warshavsky, Oren J.; Ferguson, Gerald; Wilcox, Deborah; Wallace, Kevin M.; Gehman, Lisa Bollinger
Cc: Rebecca Tushnet; Mark McKenna; Christopher J. Sprigman
Subject: Re: Hermes International et al. v. Rothschild, 22-cv-384-JSR; Discord messages
Attachments: Rothschild007488.txt

Dear Oren,

We will be submitting declarations that address this matter, but I wanted to respond to your questions here, and I'm of course happy to discuss on the phone if you would like. As you know, we worked at a breakneck pace to produce over 18,000 pages of documents in discovery. As I noted in my prior email, our discovery vendor, Consilio, collected and searched the entirety of Mr. Rothschild's Discord account data along with Mr. Rothschild's other ESI (texts, emails, social media, etc.). Consilio used industry standard tools for handling ESI, but apparently those tools are ill equipped for parsing and reproducing Discord data. Apparently Discord data rarely comes up in litigation; Consilio has informed me that they have had only three cases (including this one) that have involved Discord data out of thousands of cases they've handled. My office only learned of this on Monday, when I wrote to you. I was not aware prior to that that the Discord communications we produced were produced in such a limited way.

This is not a discovery abuse by Mr. Rothschild, who made reasonable efforts using a well-regarded discovery vendor to search and produce responsive ESI. I respond to your specific points below.

Please let me know if you'd like to discuss further on the phone.

Best,
Rhett

From: Warshavsky, Oren J. <owarshavsky@bakerlaw.com>
Date: Tuesday, October 18, 2022 at 8:07 AM
To: Rhett O. Millsaps II <rhett@lex-lumina.com>, Ferguson, Gerald <gferguson@bakerlaw.com>, Wilcox, Deborah <DWilcox@bakerlaw.com>, Wallace, Kevin M. <kwallace@bakerlaw.com>, Gehman, Lisa Bollinger <lgehman@bakerlaw.com>
Cc: Rebecca Tushnet <rtushnet@lex-lumina.com>, Mark McKenna <mark@lex-lumina.com>, Christopher J. Sprigman <chris@lex-lumina.com>
Subject: RE: Hermes International et al. v. Rothschild, 22-cv-384-JSR; Discord messages

Dear Rhett,

I'd like to make sure we understand your email below and its context. Please let me know if any of the below is inaccurate, and if so, how. Please note that we may use this correspondence in connection with the current briefing.

- a) You have provided us with three documents not previously produced in discovery (collectively, the "New Documents"):

1. "Exhibit 1.PDF" which has never before been provided, and appears to have been created for this purpose;
2. "Exhibit 2.JPEG" which appears to be a screen shot from a phone, which was never produced;
3. "Exhibit 3.JPEG" which appears to be a screen shot from another source, which also was never produced.

- b) During discovery, Mr. Rothschild produced the following two documents: Rothschild007790 and Rothschild007944.

Correct.

- c) I introduced Rothschild007790 and Rothschild007944 at Mr. Rothschild's deposition on August 4, 2022. Rothschild007790 was introduced as Exhibit 30 and Rothschild007944 was introduced as Exhibit 31. Copies of those marked exhibits, with their bates numbers, are attached for your reference.

Correct.

- d) Rothschild007790 and Rothschild007944 were provided to our experts, and are the basis upon which they drew certain conclusions, which is made plain in the reports in question.

Yes, your experts chose to present as fact that those screenshots showed a live page presented during the actual *MetaBirkins* NFT minting process despite Mr. Rothschild's testimony at his deposition that they could not have been taken from live screens during the minting process because they are "local host" files, which are not live pages.

- e) At no point, in connection with items b) – d) above did Mr. Rothschild provide the New Documents as context for Rothschild007790 and Rothschild007944.

As I've explained, we were unaware that the Discord data was originally produced in such a limited way until this week, and we had to conduct an additional manual search to find the conversation with the screenshot that shows the actual live minting page. We didn't think this issue was material to anything until we received Hermès Rule 56.1 statement, which improperly presented as an undisputed fact that Rothschild007790 and Rothschild007944 were live pages used in the minting process, despite the fact that Mr. Rothschild had testified under oath that they were not.

- f) Hermès relied on Rothschild007790 and Rothschild007944 in its summary judgment filing.

Hermès did indeed present as an undisputed fact that Rothschild007790 and Rothschild007944 were live pages used in the minting process, despite the fact that Mr. Rothschild had testified under oath that they were not.

- g) At some point after Hermès's summary judgment papers were filed, you gained further context from Mr. Rothschild and/or your vendor concerning Rothschild007790 and Rothschild007944.

Correct; see above.

- h) Exhibit 1 of the New Documents appears to be a document created in the last several days.

Correct.

- i) Exhibit 1 of the New Documents contains three rows, two of which refer to documents produced with Bates Numbers Rothschild007488 and Rothschild008010.

- p) The New Documents would have been responsive to Hermès's discovery demands which yielded Rothschild007790 and Rothschild007944.

Correct.

- q) The context that you intend to rely upon—the New Documents—changes the meaning and provenance of Rothschild007790 and Rothschild007944.

Incorrect. Mr. Rothschild testified unequivocally at his deposition that the screenshots shown in Rothschild007790 and Rothschild007944 did not come from his computer and showed a wallet ID that was not his, in addition to testifying that they were screenshots of "local host" pages that could not have been the live page used in the minting process.

- r) There has been no prior disclosure concerning Rothschild007790 and Rothschild007944 or the New Documents as you have tried to explain them below.

Mr. Rothschild testified about them at his deposition, as noted above.

- s) The first and second columns of Exhibit 1 appear to be references created for this project.

I'm not sure what you mean here.

- t) The third, fourth, fifth, and sixth columns of Exhibit 1, titled "CUSTOM_DETAILS_Chat ID," "CUSTOM_DETAILS_Source file," "CUSTOM_CONNECTION_DATETIME," and "CUSTOM_SOURCE" were never produced by Rothschild. Rather, the data Rothschild provided in connection with those documents is contained here in the attached spreadsheet titled Rothschild002 metadata.xlsx.

Correct. Consilio has explained to me that this is due to the nature of Discord data and the way that their tools process it.

- u) Throughout discovery, we asked you about these types of documents, for which there was no associated image. The email below was the first time Rothschild purported to provide any sort of context or corrected document.

This simply is not true. We responded cooperatively where appropriate to every request that you sent for additional information during discovery; you never raised these files in particular or Discord data generally as an issue. If you had, we would have looked into this immediately and figured it out. As it is, we discovered this issue only because Hermès listed as an "undisputed fact" in its Rule 56.1 statement a contention for which it had no evidence (i.e., that the screenshots produced by Mr. Rothschild actually were used in the *MetaBirkins* NFT minting process), when that "fact" was clearly disputed by Mr. Rothschild's testimony.

Please let me know if I you disagree with any of items a) – u) above, and if so, why.

I ask that you please respond only respond to directly to the facts I have written above and avoid raising issues related to your (or Mr. Rothschild's) feelings about Hermès, its counsel, its litigation strategy, Mr. Rothschild's First Amendment rights, etc. Please do so *prior* to the filing of your opposition where you intend to include those documents—if we do not have that before such time, we will understand that you do not disagree with any of the foregoing.

To be clear, we believe that this a discovery abuse by Mr. Rothschild and reserve all rights. While we will deal with this and others at the appropriate time, should you submit the New Documents, we will be using

the foregoing and your response thereto (or lack thereof) as a basis to challenge and or strike any submission. Obviously, should Mr. Rothschild try to rely on documents not produced in discovery—or not produced in any intelligible manner—we will be seeking to have them excluded, among other remedies.

Please let me know if you have any questions, would like to discuss, etc.

Best wishes,

Oren

Oren Warshavsky

He | Him | His
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From: Rhett O. Millsaps II <rhett@lex-lumina.com>

Sent: Monday, October 17, 2022 7:11 PM

To: Warshavsky, Oren J. <owarshavsky@bakerlaw.com>; Ferguson, Gerald <gferguson@bakerlaw.com>; Wilcox, Deborah <DWilcox@bakerlaw.com>; Wallace, Kevin M. <kwallace@bakerlaw.com>; Gehman, Lisa Bollinger <lgehman@bakerlaw.com>

Cc: Rebecca Tushnet <rtushnet@lex-lumina.com>; Mark McKenna <mark@lex-lumina.com>; Christopher J. Sprigman <chris@lex-lumina.com>

Subject: Hermes International et al. v. Rothschild, 22-cv-384-JSR; Discord messages

[External Email: Use caution when clicking on links or opening attachments.]

Dear Counsel,

In preparing our response to Hermès' summary judgment papers, today we discovered that due to technical limitations, our discovery vendor was able to produce Mr. Rothschild's responsive direct messages from Discord only in a very limited format. Specifically, our vendor collected and searched the entirety of Mr. Rothschild's Discord account, but because of the nature of the Discord software, our discovery vendor's search of the Discord data returned only the single, responsive lines of text contained in the messages—for example, the lines "but metabirkin" and "if i use birkin alone" were produced as database entries without any of the surrounding messages or other context. See Rothschild007488 and Rothschild008010. I've also attached here as Exhibit 1 an Excel export of those messages with metadata, created from the data as we produced it.

I have attached as Exhibit 2 here a screenshot of the message exchange from which these messages were collected and produced, which we will submit with Mr. Rothschild's opposition to Hermès' summary judgment motion, along with a declaration from our vendor explaining the situation. This corroborates Mr. Rothschild's testimony regarding Hermès' Exhibits 30 and 31 at his deposition; namely, that the screenshots were not from his computer, that they showed that they were from a "localhost" and not a live site, and that he did not believe

they were the final versions actually shown to minters of *MetaBirkins*. See M. Rothschild Dep. (August 4, 2022) 244:19-247:18. Additionally, by manually going through Mr. Rothschild's Discord account, we were able to locate messages that include a screenshot of the final, live version of the page that was presented to people when they minted *MetaBirkins*. I have attached a screenshot of those messages as Exhibit 3.

Best,
Rhett

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